BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the consolidated matter of: STUDENT, Petitioner, v. CENTRALIA ELEMENTARY SCHOOL DISTRICT, Respondent.	OAH CASE NO. N2005071071
CENTRALIA ELEMENTARY SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH CASE NO. N2005071072

DECISION

Gary A. Geren, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on October 11–14, 2005, in Buena Park, California.

Petitioner, Adrian B., (Adrian) was represented by Michael E. Jewell and Meredith Young of the law firm of Roberts, Adams & Jewell.

Respondent, Centralia Elementary School District (District), was represented by Sharon Watt of the law firm of Filarsky & Watt.

The Petitioner called the following witnesses: Alieta (Adrian's mother), Barbara Pliha (speech and language therapist), Aliany (Adrian's aunt and a special education teacher in Kern County), Trisha Pettus (District educational psychologist), Christy Wright (District speech and language therapist), and Dr. Chris Davidson (District educational psychologist).

The District called the following witnesses: Angela McDermid (District Resource Specialist Program (RSP), teacher), Linda Powell (District speech and language therapist), Karen Kennedy (District speech and language therapist), Wendy Castillo (District educational psychologist), and Dr. Linda Matlock (Director of Special Education).

The following people were present at different times during the hearing: Alieta, Dr. Matlock, and Theresa Hawk (District's special education coordinator).

Oral and documentary evidence were received. The parties agreed to simultaneously submit closing briefs. The briefs were filed with the OAH on October 31, 2005. They are identified as Student's exhibit 88, and District's exhibit 40, respectively.

ISSUES[1]

1. Did the District deny Adrian a Free and Appropriate Public Education (FAPE) for the 2002-2003, school, and extended school, years? Petitioner asserts Adrian was denied a FAPE during this time because the District failed to:

    A. Conduct appropriate and comprehensive assessments of him by failing to:

        i. properly observe his classroom behavior;
        ii. refer him to an audiologist;
        iii. administer to him two subtests of the Language Processing Test-Revised (LPT); and
        iv. obtain a language sample from him.

    B. Develop goals to address all of his deficits and to meet his unique needs by failing to include a goal in the area of:

        i. "auditory processing;"
        ii. "verbal expressive language;"
        iii. "semantics;" and,
        iv. "word finding."

[1] On the first morning of the hearing, the parties resolved the District's portion of the case (OAH No. N2005071071).

C. Offer appropriate programs and services to him, by failing to provide him:

i. with speech and language therapy; and,
ii. a behavioral therapy plan.

D. Offer him Extended School Year (ESY) services.

2. Did the District deny Adrian a FAPE for the 2003-2004, school, and extended school, years? Petitioner asserts Adrian was denied a FAPE during this time because the District failed to:

A. Develop goals to address all of his deficits, and to meet his unique needs;
B. Provide him assistive technology;
C. Offer him appropriate programs and services; and,
D. To require his regular education teacher to remain present during the entire May 14, 2004, IEP meeting;
E. Offer him ESY services.

3. Did the District deny Adrian a FAPE for the 2004-2005, school, and extended school, years up to, and through, the due process hearing? Petitioner asserts that Adrian was denied a FAPE during this time because the District failed to:

A. Develop goals to address all of his deficits, and to meet his unique needs;
B. Offer him appropriate programs and services;
C. Comply with appropriate procedures in proposing his January, 2005, assessment plan;
D. Comply with the laws governing his Independent Educational Evaluation (IEE), and to reimburse Petitioner for the cost of the IEE;
E. Provide Speech and Language Therapy (SLT), and to reimburse Petitioner for the cost of the services provided to Adrian by the Reading and Language Center (RLC);
F. Obtain appropriate consent to conduct the assessment of his SLT needs; and,
G. Follow proper procedures relating to the September 21, 2005, addendum to his IEP.

4. Must the District provide Adrian with compensatory education?

5. Should the District be ordered to provide Adrian with individual SLT?

6. Should the IEP's be Presumed to be an Offer of a FAPE?

FACTUAL FINDINGS

The Parties and Procedural Background.

1. At the time of the hearing, Adrian was a twelve-year-old boy (date of birth, December 19, 1993) and a student in the District since September, 2002. He transferred to the District from the Magnolia Unified School District (Magnolia). He received no special education services while enrolled in Magnolia.

2. In September, 2002, the District assessed Adrian's eligibility to receive special education and related services (the initial assessment). The initial assessment was requested by Adrian's mother. This assessment was completed on October 15, 2002. Adrian qualified for special education and related services as a student with a specific learning disability. His assessment showed he was not eligible to receive speech and language therapy. On October 24, 2002, the District convened a meeting of the initial IEP team. The team comprised the following members: Adrian's mother, his regular education and special education teachers, a District speech and language specialist, a District Administrator, a District psychologist, and the District Director of Special Education. The IEP team developed an IEP designed to meet his unique needs.

3. The Petitioner filed a due process hearing request notice (notice) on February 23, 2005 (two-years, and four months, after the initial IEP was developed). Petitioner alleges the following syllogism applies to the matter: Adrian's initial assessment was flawed because it was inaccurate and incomplete; his IEPs developed pursuant his assessments were; therefore, flawed as a consequence, he was denied a FAPE. Petitioner alleges they are entitled to receive compensatory educational services and be reimbursed for costs incurred on Adrian's behalf as a result of services he was provided at the RLC, a non-public agency.

4. The District filed a due process hearing notice on February 25, 2005. (Student's exhibit 4). The District's notice concerned its right to assess Adrian. (See footnote 1).

5. On March 2, 2005, the parties requested the matter to be taken off-calendar; their requests were granted on March 4, 2005. (Student's exhibit 6).

6. Each party filed a motion to consolidate the matters for a single hearing; their requests were granted on March 14, 2005. (Student's exhibit 7).

7. On August 30, 2005, the matter was placed back on calendar and a due process hearing was ordered to commence on October 14, 2005. (Student's exhibit 8).

Issues:

1. Issue One: The 2002-2003 School, and Extended School, Years (Adrian's Third Grade Year).
The Assessment of Adrian's Classroom Behavior (Issue 1.A.i.).

8. The District completed an assessment of Adrian in October, 2002, and prepared an eight page "Multidisciplinary Psychoeducational Evaluation" that memorializes the findings (Student's exhibit 41). The evaluation was conducted by school psychologist, Ms. Pettus. Ms. Pettus observed Adrian while he attended his regular education classroom. At that time, Adrian was involved in a group math activity while seated at his desk with two girls and three boys. He worked with a female classmate. He was appropriately dressed, well-kept, and seemed very engaged and excited about the activity in which he was involved. He interacted appropriately with classmates. Adrian was eager to complete the tasks assigned to him and tried to be the first of the students to complete the task. He was very happy and enthusiastic. He did, however, have great difficulty speaking quietly. He was asked, several times, by his teacher to keep his voice down. On those occasions, he responded appropriately by nodding his head and agreeing to do so. Ms. Pettus's observations were made before Adrian realized she was the school psychologist assigned to observe his behavior. She was well aware of the duties imposed upon her as part of a multidisciplinary IEP team member. She has participated in the IEP process many times; before she worked on Adrian's case. Ms. Pettus is a persuasive and credible witness.

9. The Petitioner failed to establish the District's observations as inappropriate. Dr. Davidson, an educational psychologist, was called as a witness by the Petitioner. She concluded that Ms. Pettus's observations failed to establish a sufficient "tie" between Adrian's behavior and his academic and social functioning. Dr. Davidson has never met with, spoken to, or observed, Adrian. Her opinions were based on documents provided to her by Petitioner's counsel which included a series of flawed assessments conducted by the RLC (discussed in detail, infra.). Ms. Davidson's testimony is less persuasive than that of Ms. Pettus on this point. Hence, the District observed Adrian in an appropriate setting.

The District's Failure to Refer Adrian to an Audiologist (Issue1.A.ii.).

10. Petitioner asserts that because of the marked difference between Adrian's "Performance I.Q." (ranked in the top 94th percentile), and his "Verbal I.Q." (ranked in the bottom 8th percentile), the District was, "…on notice that there was a <u>significant</u> issue…" (District's exhibit 88, p. 10, line 23, original emphasis). Dr. Davidson opined that the District should have referred Adrian for an audiological assessment. She opined "further probing" by the District was necessary in order to properly assess him.

11. District speech and language pathologist, Ms. Wright, holds a Bachelor of Arts and Masters Degree in Communication Disorders. She did not, in her opinion, believe that an audiological assessment of Adrian was warranted. Prior to the initial IEP, Ms. Wright reviewed Adrian's school records, including his health reports. Those reports included information provided by his mother that showed Adrian had no difficulty with his hearing. Two nurses' reports showed that Adrian passed hearing tests at both the Magnolia and Centralia Unified School Districts. Ms. Wright's decision to not refer Adrian to an audiologist was appropriate. Ms. Wright is a credible and persuasive witness.

12. Also, professionals at the RLC checked Adrian's hearing abilities. The RLC's evaluation states, "Hearing was screened at school on September 25, 2002. Results indicated, hearing within normal limits. No other concerns, regarding hearing status, were reported (Student's exhibit 44; pg.1). The RLC did not recommend that Adrian receive an audiological assessment during the nine months he was receiving speech and language services from them. The Petitioner's evidence, on this point, is inconsistent; therefore, unpersuasive.

The Failure to Conduct Two Subtests of the Language Processing Test-Revised (LPT,) and to Take a Language Sample (Issues 1.A.iii and iv.).

13. The Petitioner asserts Ms. Wright's failure to conduct subtests titled, "Attributes" and "Multiple Meanings," of the LPT; as well as, to gather a "Language Sample" from Adrian, yielded a flawed assessment of Adrian. The Petitioner's contention is without merit.

14. Ms. Wright did not complete the entire battery of the LPT because Adrian became tired and began acting silly. The testing protocols for the administration of the LPT states that the entire testing should be performed during the same testing session. The protocols allows for the administrator to exercise his or her professional judgment in deciding whether or not to proceed with entire battery of tests. Ms. Wright did not err in her exercise of professional judgment in this regard. Adrian's LPT results are valid.

15. Ms. Wright's decision to forego obtaining a language sample from Adrian was a reasonable exercise of professional judgment. The Language Fundamentals (CELF-4) test she gave Adrian is similar to obtaining a language sampling.

16. Adrian qualified to receive special education services primarily because of the tests administered by Ms. Wright. Her testing was sufficient to enable the District to adequately assess Adrian's speech and language disabilities.

The Failure to Develop Goals for Auditory Processing, Verbal Expressive Language, Semantics, and Word Finding (Issues 1.B.i-iv.).

17. The ALJ must evaluate the credibility and persuasiveness of the expert witnesses who testified, on behalf of the Petitioner versus those on behalf of the District, in

order to resolve this issue. The testimonies of the District's witnesses, all of whom are well-qualified experts, are substantially more credible and persuasive than that of the Petitioner's experts. The District's witnesses conveyed a professional demeanor, answered the questions given to them in a direct and succinct fashion, and exuded a genuine sense of concern for the appropriate education of their students, including Adrian. They each knew Adrian and were aware of his unique needs.

18. The Petitioner's key witness on these topics is speech and language expert, Dr. Pliha. While Dr. Pliha is unquestionably a well-credentialed expert, she is not a persuasive one here. In sum, she provides no basis for the ALJ to conclude that her opinions, regarding Adrian's needs, are more accurate than the opinions formed by the District's personnel. This conclusion is supported by the following:

19. At the time of her testimony, Dr. Pliha was a partner in the privately operated "Reading and Learning Center" (RLC). Adrian's mother took him to the RLC for a speech and language evaluation on January 27, 2005.[2] Adrian's initial evaluation at the RLC required him to complete a series of diagnostic tests. The tests were administered by Ms. Stuckey, M.A., C.C.C., S.L.P., and California License: SP 14040. Dr. Pliha testified that Ms. Stuckey was an independent contractor affiliated with the RLC, and that she supervised Ms. Stuckey's work. Both Dr. Pliha and Ms. Stuckey signed the RLC's "Speech and Language Evaluation." The evaluation is wrought with errors. The evaluation contains errors in the scoring of the tests, violations of the protocols for the proper administration of the tests, and the conclusions reached about the degrees of Adrian's speech and language disabilities. Dr. Pliha admitted the RLC conducted a faulty evaluation of Adrian that erroneously showed him to be more disabled than he actually was. Ms. Stuckey is no-longer affiliated with the RLC, at least in part, for the inaccurate evaluation she prepared regarding Adrian.

20. The errors in the RLC's initial evaluation went unnoticed by them for the nine month period it provided speech and language therapies for Adrian. Therefore, he received therapies from the RLC that were predicated on an erroneous assessment of him. Dr. Pliha discovered the errors contained in the initial assessment as she was preparing to testify in this matter. She attempted to correct them by preparing an addendum to the initial evaluation. The addendum was prepared on September 21, 2005; nineteen days before the commencement of the instant hearing. The addendum also contains errors. For example, the addendum states that Adrian's scores on the Word Definitions subtest of the CELF-4, indicates he has difficulties in defining the multiple meanings of words. However, on cross-examination, she conceded the CELF-4 does not measure one's ability to define multiple word meanings. At base, the ostensible relevance of Dr. Pliha's testimony was to establish, on behalf of the Petitioner, that the assessments performed by

[2] Student's exhibits numbered 78, 79, and 80, are invoices from the RLC. These documents show that Adrian's evaluation was conducted on January 27, 2005; however, exhibit 79 shows that RLC's account for Adrian was opened on December 25, 2004.

the District were either flawed or incomplete. However, it was Adrian's evaluations performed by the RLC that were flawed.[3]

21. Dr. Pliha also lacked a solid factual foundation from which to testify about Adrian's needs: Dr. Pliha never provided any of the services Adrian received during the nine months he attended the RLC, and she had only met him "in passing" until she met with him as part of her preparation to testify at the hearing. Also, it was at this time that she first reviewed Adrian's school records.

22. Ms. Davidson is the most credible of the Petitioner's witnesses; however, her testimony is summarized by her opinion that at the time of Adrian's initial assessment, she would have done more testing than that which was done by the District. Her opinion that more testing could have been done, does not mean that the testing performed by the District was insufficient. Accordingly, her testimony is of little probative value in determining whether the District properly assessed Adrian.

23. The District's initial assessment did identify Adrian's "Delays in auditory processing..." (Student's exhibit 11, pg. 2). Following the initial assessment, the IEP team developed Adrian's goals that included Reading (Sight Words), Reading (Comprehension), Written Language, and Prevocational. (Student's exhibit 11, pgs. 4-7). These goals were developed by the IEP team with full knowledge of Adrian's auditory processing deficit. The goals had both oral and written components that addressed this deficit. Adrian received special education services beyond those merely spelled-out in his IEP, which also addressed Adrian's auditory processing problem. Accordingly, the District developed appropriate goals and objectives for Adrian's 2002-2003, school year. The District provided him with services to meet his unique needs. The goals and objectives were agreed to by the entire IEP team, including Adrian's mother. Thereafter, Adrian either met, or progressed towards meeting, the goals west forth in the IEP. Adrian's was not denied a meaningful educational opportunity because the District failed to offer more than the four goals, and twelve objectives, set forth in his initial IEP. The IEP provided Adrian with a meaningful educational benefit.

Failure to Offer Adrian SLT((Issue 1.C.i.).

24. Adrian did not qualify to receive speech and language services based on his initial assessment.

25. The District's failure to offer Adrian SLT as part of his IEP following his initial assessment was appropriate. (Factual finding 2).

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[3] An expert's opinion that is based on unreliable assumptions of facts diminishes the probative value of the opinion offered. *Blecker v. Wolbart* (1985) 167 Cal.App.3d. 1195. An expert's opinion must take into account only reasonable and credible factors. *Pacific Gas & Electric Company v. Zuckerman* (1987) 189 Cal.App.3d. 1113. The value of an expert opinion rests not on the conclusion reached, but in the factors considered and the reasoning employed. (Ibid., at pp. 1134 -1135.).

The Failure to Provide Adrian with Behavioral Therapy (Issue 1.C.ii.).

26. Ms. McDermid observed Adrian not only in the RSP setting, but also, in his general education classroom. On those occasions, he appeared on-task, followed directions, and participated in the class curriculum.

27. During his third-grade year, Adrian's mother worked as the class's "Room Mother." She attended class with Adrian daily; from 8:15 a.m. to 11:30 a.m. She was the class mother during his entire third-grade year. During this time, she did not see Adrian exhibit any conduct in the classroom that she considered to be a behavioral problem. She was familiar with the IEP process following her participation in the September, 2002, assessments and development of the IEP. Accordingly, during this time, she was aware of the rights she possessed as a parent of a special education student. She never made a written request asking the District to assess Adrian's behavior. Hence, the District's failure to offer Adrian behavioral therapy services during his third grade year was appropriate. Adrian was not denied access to his educational opportunities because the District failed to assess his potential need for behavioral services.

D. The Failure to Offer an Extended School Year Following his Third Grade Year (Issue 1.D.).

28. The District's failure to offer ESY at the conclusion of the 2002-2003, regular school year, was appropriate. His special needs were met during the regular academic year and the District did not anticipate that he would regress at a level beyond that which is typical of all students who return to school after a summer recess.

2. Issue 2: *The 2003-2004, School, and Extended School, Years (Adrian's Fourth Grade Year):*

The Need to Conduct Further Assessments and Develop Additional Goals in Order to Identify all of Adrian's Deficits and Meet His Unique Needs (Issue 2.A.).

29. The District conducted its annual IEP review on October 24, 2003. The IEP team concluded that Adrian either met or made progress on his previous year's IEP goals. At this IEP meeting, new goals and objectives were developed for Adrian in the areas of language arts (organization, focus and reading comprehension) and prevocational. This IEP notes that Adrian was on a classroom behavior contract at that time, as well as a school-wide behavior plan. Adrian's mother signed the annual IEP and agreed, without expressing any reservation, to its implementation. The goals and objectives developed at the October 14, 2003, annual IEP meeting, appropriately addressed Adrian's unique needs.

30. There were no changes in Adrian's circumstances that triggered a need for the District to conduct further assessments; or that, indicated Adrian needed speech and language services at that time

The Need to Provide Assistive Technology (Issue 2.B.).

31. The "assistive technology" at issue is a "spell-checker" device. Adrian was provided a spelling dictionary by the District and an electronic spell-checking device, by his mother. Adrian preferred the use of the spelling dictionary. Both modalities qualify as "spell-checkers," and as such, Adrian received appropriate assistive technology. Moreover, Dr. Pliha affirmed that Adrian's access to an electronic spell-checker, versus a spelling dictionary, was not a, "big issue." Hence, Adrian was not denied access to appropriate assistive technology.

The Need for Appropriate Programs and Services (Issue 2.C.).

32. The District's experts were more convincing on this point. The programs and services provided to Adrian by the District were reasonably calculated to meet his unique needs. The District complied with the provision of the programs and services that were listed in the IEP. As a consequence, the District provided Adrian with a program that provided him with some educational benefit.

The Attendance of the Regular Education Teacher for the Entire May 14, 2004, IEP Meeting (Issue 2.D.).

33. Adrian's regular education teacher attended the first thirty (30) minutes of the May 14, 2004, IEP meeting. The meeting was convened at the request of Adrian's mother. His regular education teacher participated in the development of the IEP addendum that followed this meeting. The IEP addendum includes notations attributable to her; wherein, she stated that, "Adrian's "science has been modified… [and] Positive reinforcement has been in place…" Her signature appears on the IEP document. Ms.McDermid chaired the meeting. Had the need arose to acquire additional information from Adrian's regular education teacher, Ms. McDermid would have required her return to the meeting.

34. Adrian's mother and aunt attended this meeting, as well. The document refers to Adrian's aunt as, "Mom's sister (RSP Teacher)"(Student's exhibit 13). They each signed and dated the IEP addendum. Adrian's mother initialed it to indicate that she was informed of her rights and that her rights were reviewed with her as part of the IEP meeting. There is no reference in the IEP addendum that suggests Adrian's mother or his aunt objected to the departure of the regular education teacher from the meeting; nor, that they requested her to provide further information beyond which she provided prior to leaving. The regular education teacher's failure to attend the entire IEP meeting did not inhibit Adrian's mother or his aunt from fully participating in the IEP process. Adrian's mother and aunt engaged in a robust IEP meeting. All necessary parties from the District attended and participated in the meeting.

35. Prior to the May 14, 2004, meeting, Adrian's mother read Adrian's IEPs to his aunt, and special education report cards, over the phone. Adrian's aunt has been actively involved in his education. Her education and background, therefore, are noteworthy. She is a special education teacher in Kern County. She obtained a Bachelor of Arts degree from California State Polytechnic University, with a minor in Psychology, in 1998. She obtained a teaching credential in 1999. She obtained a Masters Degree in Reading from California State University, Fullerton, in 2002. She has a reading specialist credential issued by the State of California. She needs to complete only one additional class to obtain her Masters Degree in Special Education. She is working in her fourth year as a resource specialist at "problem" schools. Prior to her moving to Kern County in August of 2002, she had extensive interaction with Adrian; seeing him approximately once per week, as she lived nearby. After she moved to Kern County, she saw him approximately three times per month and continued to speak with him on the phone, once per week. She knew the nature of Adrian's learning problems. Based on her education, training, and familiarity with Adrian, her participation at the May 14, 2004, IEP meeting, assured that Adrian's interests were well represented in the IEP process; and that, all concerns regarding Adrian's education were communicated to the District.

36. As a consequence of the May 14, 2004, meeting, the District added an expressive language goal, agreed to have the RSP teacher work more closely with Adrian's regular education teacher, modified his general education curriculum, referred him for a speech assessment, and recommended that a social-emotional assessment of him be conducted. There was a consensus reached by the IEP team as to which goals and objectives were necessary in order to meet Adrian's unique needs. There is no evidence to suggest that a different IEP from the one that was developed as a consequence of this meeting would have come about had Adrian's regular education teacher remained present during the entire session. Accordingly, Adrian's mother was not denied the opportunity to participate in the IEP process. Adrian suffered no educational harm as a result of his regular education teacher being excused from attending the entire May 14, 2004, IEP meeting.

The Failure to Offer Extended School Year Services (Issue 2.E).

37. The District acted reasonably by failing to provide Adrian extended school year services at the conclusion of the 2003-2004, regular school year, for the same reasons set forth at factual finding 28.

3. Issue 3: The 2004-2005, School, and Extended School, Years (Adrian's Fifth Grade Year):

The Failure to Develop Appropriate Goals (Issue 3.A.).

38. By October 7, 2005, Adrian had in place an IEP that listed goals and objectives to address the areas of reading comprehension, writing, behavior, and behavior work production, and speech (synonyms and antonyms). Auditory processing services and

word-finding therapies are imbedded within these goals. The District's provision of these services met Adrian's unique needs and provided him with a meaningful educational benefit. The testimony of the District's experts is more credible than that offered by the Petitioner's experts on this point.

The Failure to Offer Appropriate Programs and Services (Issue 3.B.).

39. Adrian received special education services that addressed his unique needs and provided him with a meaningful educational benefit. (Findings 29, 30-32, and 35-37). This is particularly true in light of the District's competing duty to provide Adrian with the opportunity to participate in the general educational curriculum and extra-curricular school activities. Adding the level of additional special education services urged by the Petitioner's experts, it would have likely have had a negative effect on Adrian's development. Those increased services would have likely demanded too much of his time and overtaxed his energy. Accordingly, the programs and services offered to Adrian by the District during this time were appropriate to meet his unique needs and to provide him with meaningful educational benefit.

The January, 2005, Assessment Plan (Issue 3. C.).

40. On December 7, 2004, Adrian's mother requested the District to remove Adrian from his RSP. On that date, the District replied to her request. Therein, the District sought her permission to assess Adrian before they withdrew him from his RSP. On January 12, 2005, and February 18, 2005, the District again requested permission from his mother to assess Adrian. Adrian's mother did not permit the district to assess Adrian. By January 12, 2005, Adrian's mother, through her counsel, notified the District that she disagreed with the assessment that the District completed in October, 2002. The Petitioner, at this time, also, requested that the District pay for an independent educational assessment. On January 27, 2005, Adrian's mother had him evaluated by the RLC. Accordingly, the District's failure to assess Adrian was a consequence of his mother's choices, not the result of any alleged procedural violation committed by the District.

The Reimbursement for the Independent Educational Evaluation (IEE) Done by the RLC (Issue 3.D.).

41. As stated in findings 10-17 and 23-25, the speech and language assessment conducted by the District was appropriate; Adrian did not qualify to receive services in those areas. As stated in findings 18-21, the evaluation conducted by the RLC was flawed. As stated in finding 40, the District attempted to conduct additional assessments, yet was denied the opportunity to do so. In light of these findings, the District's refusal to reimburse the Petitioner for the flawed IEE is appropriate.

The Reimbursement for the Provision of Speech and Language Services Provided by the RLC (Issue 3.E.).

42. The District provided Adrian with speech and language services that substantially complied with the provisions spelled-out in the governing IEP.

43. The District requested, but was denied, the opportunity to assess Adrian in the area of speech and language services, both before and after Adrian's referral to the RLC. Petitioner unreasonably withheld its consent to allow the District to assess Adrian during.

44. The services provided by the RLC were provided pursuant to a flawed evaluation. (Findings 18-21). In light of all of the above, the District's refusal to reimburse the Petitioner for the speech and language services provided by the RLC is appropriate.

The Appropriateness of the District's Assessment of Adrian's Speech and Language Needs (Issue 3.F.).

45. The District obtained appropriate consent from Adrian's mother to conduct the speech and language assessment of Adrian it ultimately completed. This is established by Adrian's mother's initials and signature contained on the consent form that she completed prior to his assessment (District's exhibits 13 and 44).

The Procedures Relating to the September 21, 2005, IEP Meeting (Issue 3.G.).

46. On September 21, 2005, a meeting of the IEP team was held at the request of Adrian's mother. At the meeting, she demanded that the District provide Adrian with speech and language services, in addition to the other services provided in the IEP. The District, in an addendum to the IEP, added speech and language services. No alteration to Adrian's general education program was discussed; nor, was a change to his general education program made. The alleged failure of the District to identify on the addendum whether Adrian's speech and language services would take place in an individual, or a group setting, is of no consequence. Adrian's mother knew the therapies would take place in a small group setting. Also, the IEP team met again on October 7, 2005, less than two-weeks after the creation of the addendum that the Petitioner alleges is defective. Following this meeting, the District prepared a document that states, "Student requires specialized, small group instruction in the area of expressive language"(Student's exhibit 15). Adrian's mother initialed, signed, and dated this document; thereby, memorializing that she was aware of her rights and was in agreement with the services offered to Adrian. Any defects that may be contained in the September 21, 2005, IEP addendum, did not result in any educational harm to Adrian, nor did it impede his mother's right to participate in the IEP process.

4. The Compensatory Education Issue.

47. Based on factual findings 2, 16, 23-25, 28-29, 31-32, 34-38, 39, 42, and 45, the District provided Adrian with appropriate special educational services that provided

him with some meaningful educational benefit. No procedural violations were committed by the District that resulted in Adrian being denied access to any educational opportunities or that denied his parent's an opportunity to participate in the development of his educational program. Accordingly, the District's refusal to provide compensatory education is appropriate.

5. The Individual Speech and Language Services Issue.

48. Adrian's receipt of speech and language services in the small group setting is appropriate to meet his needs. It is likely more beneficial to Adrian than him receiving individual speech and language therapy because of his ability to interact with fellow students, as well as the avoidance of his feeling isolated. Accordingly, the District's refusal to provide individual speech and language services is appropriate.

6. The District's Contention that the Petitioner May Not Challenge the Appropriateness of Adrian's IEP's.

49. Adrian's mother asked the District to conduct an assessment of Adrian to determine whether he was qualified to receive special education services (Factual finding 2). She was a member of the initial IEP team and participated in the development of the initial IEP. As part of her participation, she provided a "Health, Development, and Social History" form, dated September 11, 2002 (Student's exhibit 38). This document (six pages long) provides the following detail about Adrian's background: Adrian's mother was the principal provider of Adrian's care and his father worked outside the home. Adrian has a brother approximately four years older than he. Adrian's "growth and development" was identified by his mother as being similar to that of his brother's, who does not receive special education services. Adrian's mother stated that her "concerns" about Adrian were, "difficulty in written language and spelling. Some listening and speaking delays" (Student's exhibit 38).

50. Adrian's mother agreed with the appropriateness of the initial IEP developed by the IEP team and acknowledged this by signing it. The initial IEP attributes the following observations to her: "[Adrian's] assessment results follow exactly what she is seeing at home". She initialed the IEP document to indicate: "(I Do) Agree with this Individualized Education Program/ITP" and "(I Do) Agree with the recommended Special Education Program Placement" (Student's exhibit 11, p. 9). She placed her initials next to a statement that read: "I understand that I may revoke my consent at any time". The initial IEP is dated October 24, 2002 (Student's exhibit 11).

51. Adrian's mother testified that she did not read the initial IEP, but merely "looked it over". This testimony stands in contrast to factual finding 50 and the "Parent Rights Review" that she also signed on October 24, 2002; the date she signed the initial IEP (District's exhibit 11, pp. 62-63). The "Parent Rights Review" memorializes her participation in the IEP process. The first paragraph states:

> "In order to ensure that parents/guardians fully understand their parental rights, the following questions have been asked and the response to each noted. Parent/guardian signature below indicates that they have been fully informed of their rights and that the information was provided them in their primary language or that an interpreter, knowledgeable of Special Education and Procedures and Program, interpreted the information for the parents/guardian".

52. Following this paragraph, eleven (11) topics are enumerated; each of which is followed by an inquiry as to whether the parent has any questions concerning that topic. Each question may be answered by the parent by either circling "Y" [yes] or "N' [no]. Adrian's mother circled "N" for each question, indicating that she had reviewed each topic, and had no questions about the matters addressed therein.

53. Adrian's mother testified after the development of the initial IEP, she expressed a verbal objection to its appropriateness. Her testimony on this point is not credible. Her demeanor on the witness stand during cross-examination on this point was combative even after she was admonished by the ALJ on three occasions to simply answer the questions put to her. She was afforded an ample opportunity to further explain her responses during her re-direct examination. Her manner in answering the questions was unduly hostile. These factors adversely affected her credibility. Furthermore, it is unlikely given her daily assistance in Adrian's third-grade classroom, her participation in the IEP process, as well as her sister's knowledge and assistance, that she would not have made a written demand to the District to alter Adrian's IEP if she believed his educational needs were not being adequately addressed.

54. Based on findings 2, 23, 27, 29, 33-36, 45-46, and 49-53, Adrian's mother was fully aware of her parental rights regarding Adrian's special education opportunities. She fully participated in the development of each of Adrian's IEPs and approved their content.

LEGAL CONCLUSIONS

Applicable Law.

1. Under both, state and federal, laws, Individuals with Disabilities Education Act (IDEA), students with disabilities have the right to a Free Appropriate Public Education (FAPE). (20 U.S.C. §1400; Cal. Ed. Code § 56000.) The term "Free Appropriate Public Education" means special education and related services that are available to the student at no cost to the parents and that meet the state educational standards and that conform to the student's Individualized Education Program. (IEP) (20 U.S.C. § 1401(9).) "Special Education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(29).) Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit

fully from instruction (Cal. Ed. Code § 56031). The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) Cal. Ed. Code section 56363, subd.(a), similarly provides that Designated Instruction and Services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program".

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities (Id. at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student (Id. at 201).

3. To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the District actually offered rather than on the placement preferred by the parent. *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314. To constitute a FAPE as required by the IDEA and *Rowley*, a district's offer must be designed to meet a student's unique needs and be reasonably calculated to provide the student with some educational benefit. Additional requirements are that, the District's offer must conform to the IEP, must be in the least restrictive environment (LRE), and provide the student with access to the general education curriculum (See 20 U.S.C. § 1412(a) (5) (A); 34 C.F.R. §§ 300.347(a), 300.550(b); Ed. Code § 56031).

4. The parent's participation in the IEP process is also a factor in determining the appropriateness of a district's offer of a FAPE. The fact that the parents signed and approved the IEP is evidence that they considered the goals and objectives contained therein to be appropriate to meet the needs of their child at the time they signed the IEP. *J.P. v. West Clark Community Schls. (2002)* 230 F. supp. 2d 910.

5. In *Wagner v. Brd. of Ed. of Montgomery County,* (D. Md. 2004) 340 F. supp. 2d 603, the District court held that a district did not deny a student a FAPE because it offered him an appropriate IEP containing goals and objectives to which his parent agreed. The court concluded the parent's failure to object to the proffered goals and objectives, or indicate their interest in changing them at the time the IEP was developed, meant that they could not later claim the placement was inappropriate.

The District's Assessments of Adrian were Appropriate.

6. In determining whether a district offered a FAPE to a student, one must focus on the adequacy of the district's proposed program. *Gregory K. v. Longview School District,* supra. "An Individualized Education Plan ('IEP') is a snapshot, not a retrospective… [of] what was and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d. 1141. The assessments that led to the development of Adrian's initial IEP were conducted appropriately and complied with 34 CFR 300.320, and Cal. Ed. Code section 56380 (Findings 2, 8-16, 24-27, 29-30, and 33-36).

The District Provided Appropriate Goals and Objectives to Meet Adrian's Unique Needs.

7. The District met its obligation to provide Adrian with a FAPE when it designed and implemented a special education program that provided him with some educational benefit. *Board of Education of the Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176. The District provided Adrian with a FAPE at all times commencing with his enrollment in the District in September, of 2002, until the date of the instant hearing (Findings 2, 8-28).

The District did not Commit any Procedural Violations.

8. A procedural violation by a district of the IDEA does not result in the denial of a student's right to a FAPE, unless there is a loss of educational opportunity or a serious infringement on the parent's opportunity to participate in the IEP process. *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F2d. 1479. This rule was codified in the 2004 reauthorization of the IDEA (20 U.S.C. § 1415 (f) (3) (E) (ii). Under this standard, the District did not commit any procedural errors (Findings 8-16, 31, 33-36, 40, 45, and 46).

The District's Failure to Offer Adrian Extended School Years Services Were Appropriate.

9. The provision of Extended School Year (ESY) services are appropriate when a student with special needs requires special education services in excess of the regular academic year and when an interruption of the student's regular education program may cause regression (5 Cal. Code Regs., tit. 5, § 3043, subd. (a).) The District did not err in concluding that Adrian did meet this test (Findings 24 and 37).

The Petitioner is not Entitled to Reimbursement for the Costs Relating to the Assessments or Services Provided by the RLC.

10. "If a parent obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free, appropriate public education to the child and may be presented as evidence at a due process hearing...regarding the child." (Ed. Code § 56329,

subd. (c).) A parent has the right to obtain an independent educational assessment of the pupil from a qualified specialist, at public expense, if the parent disagrees with the assessment obtained by the district; however, if the district shows at a due process hearing that its assessment was appropriate, a parent is not entitled to receive reimbursement (Ed. Code § 56329, subd.(b).) The District established that its assessments of Adrian were appropriate (Legal conclusion 6).

Adrian is not Entitled to Receive Compensatory Education.

11. Court decisions, subsequent to *Burlington, supra,* extended equitable relief in the form of compensatory education to students who have been denied a FAPE (See, e.g., *Lester H. v. K. Gilhool and the Chester Upland School District* (3rd Cir. 1990) 916 F. 2d 865; *Miener v. State of Missouri* (8th Cir. 1986) 800 F.2d 749). Compensatory education is an equitable remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA" *Student W. v. Puyallup School District* ((9th Cir.1994) 31 F.3d 1489, 1497). As Adrian was not denied a FAPE, he is not entitled to reimbursement (Finding 47).

Adrian is not Entitled to Receive Individual SLT.

12. Adrian's receipt of speech and language services in the small group setting is appropriate to meet his needs (Finding 48).

Adrian's IEP's are Presumed to be Offers of a FAPE.

13. As intended by the IDEA, Adrian's mother participated in the development of each IEP. At each IEP session, the District attempted to address her concerns about Adrian's development, as well as on one occasion, the concerns expressed by Adrian's aunt. Adrian's mother signed each IEP acknowledging that she understood and agreed with them. The District complied with the procedural processes that govern the IDEA and IEP processes. Accordingly, pursuant to the authorities cited in Legal Conclusion 4, the IEP's are presumed to be an offer by the District of a FAPE. In *Schaeffer v. Weast* (2005) 126 S.Ct 528, 536, the Supreme Court held:

> "Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals. It also includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. §1415(j). Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing. *Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail*

> *when they have legitimate grievances*. See *Rowley*, supra, at 206 (noting the 'legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP). (Emphasis added)."

Justice Stevens stated in his concurring opinion in *Schaeffer,* at page 537:

> "I have, however, decided to join the Court's disposition of this case, not only for the reasons set forth in Justice O'Connor's opinion, but also because *I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute*. (Emphasis added.)"

14. After the conclusion of the hearing, and prior to the issuance of this decision, the Court in *Schaeffer*, at page 537, held that the burden of proof in an administrative hearing challenging an IEP is placed on the party seeking relief; here, that would be Adrian. However, at the time this matter was heard, the school district had the burden to prove that they complied with the IDEA. (*Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398). Regardless of the applicable burden of proof, or any presumptions regarding the appropriateness of an IEP, the District established that it complied with both the procedural and substantive components of the IDEA and, thereby, offered a FAPE to Adrian (Findings 49-54). Accordingly, the District prevailed regardless of whether the *Schaeffer* or the *Clyde K.* standard applies.

ORDER

WHEREFORE, the following order is made:

1. The District provided a FAPE to Adrian at all times from the commencement of his enrollment in the District to the date of the instant hearing.
2. The Petitioner's requests for relief are denied.

PREVAILING PARTY

1. The District prevailed on all issues.

RIGHT TO APPEAL THIS ORDER

The parties have the right to appeal this Decision to a court of competent jurisdiction within ninety (90) days of the receipt of the same. (Ed. Code § 56505, subd.(k).)

DATED: January 10, 2006.

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GARY A. GEREN
Administrative Law Judge
Office of Administrative Hearings
Special Education Division